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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 THE BANK OF NEW YORK MELLON FKA
8 THE BANK OF NEW YORK, AS TRUSTEE
9 FOR THE CERTIFICATEHOLDERS
10 CWABS, INC. ASSET-BACKED
11 CERTIFICATES, SERIES 2006-6

12 Plaintiff,

13 v.

14 STAR HILL HOMEOWNERS
15 ASSOCIATION; SBW INVESTMENT, LLC;
16 NEVADA ASSOCIATION SERVICES, INC.;
17 and SFR INVESTMENT POOL 1, LLC,

18 Defendants.

19 SFR INVESTMENTS POOL 1, LLC,

20 Counter/Cross Claimant,

21 v.

22 THE BANK OF NEW YORK MELLON FKA
23 THE BANK OF NEW YORK, AS TRUSTEE
24 FOR THE CERTIFICATEHOLDERS OF
25 CWABS, INC., 2006-6, RICHARD A. PEREZ,
26 SR. an individual, and ROSEMARIE PEREZ,
27 an individual,

28 Counter/Cross Defendants.

Case No. 2:16-cv-02561-RFB-PAL

ORDER

I. INTRODUCTION

Before the Court is Counter / Cross Claimant SFR Investment Pool 1, LLC's Motion to Certify a Question of Law to Nevada's Supreme Court. ECF No. 21. For the reasons stated below, the Motion is granted. SFR seeks certification of the following question:

1 “Whether NRS § 116.31168(1)’s incorporation of NRS § 107.090 requires homeowner’s
2 association to provide notices of default to banks even when a bank does not request notice?”
3

4 **II. BACKGROUND**

5 This case arises out of the foreclosure sale by Star Hills Homeowners Association
6 (“Association”) of its lien for delinquent assessments against the real property commonly known
7 as 5020 Piney Summit Ave, Las Vegas, Nevada 89141 (the “Property”). See Complaint
8 (“Compl.”) ECF 1 at p.3, ¶ 8; see also SFR’s Answer, Counterclaim, Cross-claim (“SFRACC”),
9 ECF 20 at p.9, ¶1. The complaint alleges Star Hill Homeowners Association's sale did not
10 extinguish the deed of trust because BACK Home Loans Servicing, LP’s (“BAC”) tender satisfied
11 the super-priority lien and NRS chapter 116 violates the Fourteenth Amendment's Due Process
12 clause. Id. ¶¶ 37–44, 48. The complaint asserts both a facial and an as-applied constitutional due
13 process challenge to the super-priority lien foreclosure statutes. SFR filed a counterclaim for quiet
14 title and injunctive relief. ECF No. 20 at 9-17.
15

16 The Parties’ pleadings, including BNY Melon’s Complaint, ECF No. 1, and SFR’s Answer,
17 Counterclaim and Cross-Claim, ECF No. 20, set forth the following facts:

18 In 1991, Nevada adopted Uniform Common Interest Ownership Act as NRS 116, including
19 NRS 116.3116(2). In 1993, Nevada amended NRS 116, repealing a portion of NRS 116.31168,
20 and enacting NRS 116.31163 and 116.31165. In October of 2004, the Association recorded its
21 declaration of Covenants, Conditions, and Restrictions (CC&Rs) in the Official Records of the
22 Clark County Recorder as Instrument Number 20041014000678.

23 On January 31, 2006, a Grant, Bargain, and Sale Deed was recorded transferring the
24 Property to Richard A. Perez, Sr. and Rosemarie Perez. On the same day, a Deed of Trust naming
25 Countrywide Home Loans, Inc. as lender, and Mortgage Electronic Registration Systems, Inc.
26 (“MERS”) as beneficiary, and Recontrust Company (“Recontrust”) as trustee, was recorded. On
27 February 5, 2010, the Perezes became delinquent on their Association dues and the Association,
28 through its agent Nevada Association Services, Inc. (“NAS”), recorded a Notice of Delinquent

1 Assessments. On May 5, 2010, the Association, through NAS, recorded a Notice of Default and
2 Election to Sell. On January 19, 2011, the Association, through NAS, recorded a Notice of Sale.

3 On August 26, 2011, an assignment was recorded by Bank of America N.A. (“BANA”),
4 stating that MERS transferred its interest in the Deed of Trust to BNY Mellon. On August 26,
5 2011, Recontrust recorded a Substitution of Trustee, identifying BNY Mellon as the new trustee.
6 Recontrust also recorded a Notice of Default and Election to Sell under the Deed of Trust. On
7 December 30, 2011, Recontrust recorded a Certificate State of Nevada Foreclosure Mediation
8 Program allowing the Beneficiary of the Deed of Trust to proceed with foreclosure. Recontrust
9 also recorded a Notice of Trustee’s Sale.

10 On May 15, 2012, the Association, through NAS, recorded a second Notice of Sale. On
11 September 15, 2012, the Association’s foreclosure sale was held, and SBW Investment, Inc.
12 (“SBW”) purchased the property. On September 20, 2012, the Association, through NAS, recorded
13 a Foreclosure Deed vesting title in SBW. The Foreclosure Deed stated that the Association
14 foreclosure sale complied with “all requirements of law including, but not limited to, the elapsing
15 of 90 days, mailing of copies of Notice of Delinquent Assessments and Notice of default and the
16 posting and publication of the Notice of Sale.” On April 5, 2013, SBW recorded a Grant, Bargain,
17 Sale Deed transferring title to SFR.

18 On October 1, 2015, Nevada amended NRS 116 to explicitly require homeowners’
19 associations to provide parties with recorded interests with notice of default and notice of sale even
20 when notice has not been requested.

21 On November 4, 2016, BNY Mellon filed its Complaint, naming the Association, SBW,
22 NAS, and SFR as defendants. BNY Mellon requests, *inter alia*, a declaration from the Court that
23 the Association Foreclosure Sale did not extinguish the Deed of Trust (and its associated priority
24 interest) and that the Deed of Trust maintains its priority interest encumbering the Property.
25 Alternatively, BNY Mellon seeks a declaration that the Association Foreclosure Sale is void.
26 BNY Mellon alleged that the foreclosure procedures were unconstitutional in that they denied
27 due process.
28

1 On January 3, 2017, SFR filed its answer and brought counter-claims against BNY
2 Mellon and the Perezes asking, *inter alia*, for declaratory relief and quiet title. SFR alleges that
3 BNY Mellon had actual notice and received the Association's Notice of Default and Notice of
4 Sale. Therefore, SFR requests a declaration that the Deed of Trust was extinguished by the sale
5 pursuant to the Nevada Supreme Court decision in SFR Investments Pool 1, LLC v. U.S. Bank,
6 N.A., 334 P.3d 408, 419 (Nev. 2014), and SFR has title free and clear of the deed of trust.

7
8 On August 12, the Ninth Circuit held NRS chapter 116's "opt-in" notice scheme violates
9 the Fourteenth Amendment's due process clause because it allows a lender to be stripped of its
10 deed of trust without requiring actual notice of the intent to foreclose. Bourne Valley Court Tr. v.
11 Wells Fargo Bank, N.A., 832 F.3d 1154, 1157–58 (9th Cir. 2016), reh'ng denied (9th Cir. Nov. 4,
12 2016). The Court in Bourne Valley, in interpreting the then-applicable notice provision in NRS
13 116.31163, held that Nevada law did not mandate actual notice to mortgage lenders whose rights
14 are subordinate to a homeowner's association super priority lien. See id. at 1159. Importantly, the
15 Court did not and could not rely upon any controlling state law as to the requirements of notice
16 under state law as to NRS 116.31163. Relying upon its own analysis of Nevada's statutory
17 foreclosure statutes, the Court found that although NRS 116.31168(1) incorporated NRS 107.090,
18 which mandated actual notice to subordinate lien holders, the notice provision in NRS
19 116.31163(2), requiring notice only to those who "notified the association, 30 days before
20 recordation of the notice of default, of the security interest," controlled, and because full
21 incorporation of the NRS 107.090 would "render superfluous" the notice provision of NRS
22 116.31163(2), the statute could not be read to require the notice relevant to the constitutional
23 challenge.

24 The Nevada Supreme Court, on January 26, 2017, issued its opinion in Saticoy Bay LLC
25 Series 350 Durango 104 v. Wells Fargo Home Mortgage, a Div. of Wells Fargo Bank, N.A., 388
26 P.3d 970 (Nev. 2017). In the opinion, the Nevada Supreme Court disagreed with the *Bourne*
27 *Valley Court* on the issue of whether due process was implicated, holding that due process was
28 not implicated in an association non-judicial foreclosure sale for lack of state action. Id. at 974,

1 n.5. Because the Nevada Supreme Court concluded due process was not implicated, it stated that
2 it “need not determine whether NRS 116.3116 et seq. incorporates the notice requirements set
3 forth in NRS 107.090.” Id.
4

5 **III. LEGAL STANDARD**

6 Pursuant to Rule 5 of the Nevada Rules of Appellate Procedure ("Rule 5"), a United States
7 District Court may certify a question of law to the Nevada Supreme Court "upon the court's own
8 motion or upon the motion of any party to the cause." Nev. R. App. P. 5(a)—(b). Under Rule 5,
9 the Nevada Supreme Court has the power to answer such a question that “may be determinative of
10 the cause then pending in the certifying court and . . . [where] it appears to the certifying court
11 there is no controlling precedent in the decisions of the Supreme Court of this state." Nev. R. App.
12 P. 5(a). Rule 5 also provides that a certification order must specifically address each of six
13 requirements:
14

- 15 (1) The questions of law to be answered;
- 16 (2) A statement of all facts relevant to the questions certified;
- 17 (3) The nature of the controversy in which the questions arose;
- 18 (4) A designation of the party or parties who will be the appellant(s) and the party or parties
19 who will be the respondent(s) in the Supreme Court;
- 20 (5) The names and addresses of counsel for the appellant and respondent; and
- 21 (6) Any other matters that the certifying court deems relevant to a determination of the
22 questions certified.

23 Nev. R. App. P. 5(c).

24 **IV. DISCUSSION**

25 The Court finds that certification to the Nevada Supreme Court is warranted in this case
26 because the pending claims and counterclaims may be resolved, in part, by a determination of
27 whether NRS 116.31163-116.31168 and, by incorporation, NRS 107.090 required associations to
28 provide notice to the recorded beneficiary of a deed of trust, which is subordinate to the super-

1 priority portion of an association lien for assessments under NRS 116.3116(2), and what notice
2 must be provided. See SFR, 334 P.3d at 419. While the Ninth Circuit has construed the statute
3 and determined that it is unconstitutional as “opt-in” only, this Court is cognizant that it did so in
4 the absence of controlling precedent or construction from the Nevada Supreme Court. And, where
5 there is no controlling precedent from the state, and the interpretation of state law is controlling,
6 then the federal court’s determination is controlling. See Huddleston v. Dwyer, 322 U.S. 232, 236
7 (1944). However, if the state court disapproves of the interpretation given by the federal court,
8 then the federal courts must follow the interpretation by the state court. See id.; see also Owen v.
9 United States, 713 F.2d 1461, 1464 (9th Cir.1983) (a federal court’s construction of state law is
10 “only binding in the absence of any subsequent indication from the [state appellate] courts that our
11 interpretation was incorrect.”). As recognized by the Ninth Circuit, “[i]t is solely within the
12 province of the state courts to authoritatively construe state legislation.” Cal. Teachers Ass’n v.
13 State Bd. Of Educ., 271 F.3d 1141, 1146 (9th Cir. 2001). This is why questions of state law should
14 be resolved in the first instance by the state’s highest court. Huddleston, 322 U.S. at 237. Because
15 the Nevada Supreme Court declined to reach the issue of notice in Saticoy Bay, there is no
16 controlling precedent from that Court. A decision by the Nevada Supreme Court on the instant
17 issue would provide this Court with guidance as to how to address the issue of notice, including
18 actual notice, and how to apply Bourne Valley in this case. Additionally, disputes over the scope
19 of discovery may be impacted by the answer to the question.

20 Because the relevant facts are set forth above, the Court addresses whether the issue “may
21 be determinative of the cause” as well as the remaining five requirements.

22 **(1) May Be Determinative of the Cause**

23 Among other claims, the Complaint seeks quiet title on the ground that NRS 116’s “scheme
24 of HOA superpriority non-judicial foreclosure violates BNY Mellon’s procedural due process
25 rights.” If the statute was facially unconstitutional, the sale pursuant to the statute was invalid, and
26 the central dispute in this matter—the validity of the foreclosure sale and title to the property—
27 would probably be resolved in favor of the Plaintiff.

28 **(1) The Question of Law to be Answered**

1 The Court certifies the following question: “*Whether NRS § 116.31168(1)’s incorporation*
2 *of NRS § 107.090 required a homeowner’s association to provide notices of default and/or sale to*
3 *persons or entities holding a subordinate interest even when such persons or entities did not*
4 *request notice, prior to the amendments that took effect on Oct 1, 2015?”*

5 **(3) The Nature of the Controversy in which the Question Arose**

6 As stated above, this case is a dispute as to the validity of a homeowners’ association
7 foreclosure sale made pursuant to the foreclosure statute found facially unconstitutional in Bourne
8 Valley Court Tr. v. Wells Fargo Bank, N.A., 832 F.3d 1154, 1157–58 (9th Cir. 2016), reh’g denied
9 (9th Cir. Nov. 4, 2016). That ruling relied on the federal circuit panel’s own interpretation of the
10 notice requirement under Nevada law. The complaint, filed after the Boerne Valley decision,
11 alleges that the statute is facially unconstitutional, and unconstitutional as applied.

12 **(4) A Designation of the Party or Parties who will be the Appellant(s) and the Party or**
13 **Parties who will be the Respondent(s) in the Supreme Court;**

14 The moving defendants / cross-claimants SFR Investment Pool 1, LLC, and Star Hill
15 Homeowners Association are designated as Appellants, and plaintiff The Bank of New York
16 Mellon is designated as Respondent.

17 **(5) The names and addresses of counsel for the appellant and respondent; and**

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15 **As Trustee for the Certificate holders of CWABS, Inc., Asset backed Certificates,**
16 **Series 2006-6**

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¹ The Court notes that Star Hill Homeowners Association did not appear in the case until February 10, 2017, after full briefing on SFR's motion to certify. See Answer to Complaint [ECF 32.] No one appeared at the hearing on behalf of the association

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8 **(6) Any other matter that the certifying court deems relevant**

9 The Court has fully laid out the relevant facts and legal questions.

10 **V. CONCLUSION**

11 **IT IS THEREFORE ORDERED** that the following question is CERTIFIED to the
12 Nevada Supreme Court pursuant to Rule 5 of the Nevada Rules of Appellate Procedure:

13 The Court will certify the following question, “Whether NRS § 116.31168(1)’s
14 incorporation of NRS § 107.090 required a homeowner’s association to provide notices of
15 default and/or sale to persons or entities holding a subordinate interest even when such
16 persons or entities did not request notice, prior to the amendments that took effect on Oct
17 1, 2015?”

18 **IT IS FURTHER ORDERED** that the Clerk of the Court shall forward a copy of this Order
19 to the Clerk of the Nevada Supreme Court under the official seal of the United States District Court
20 for the District of Nevada. See Nev. R. App. P. 5(d).

21 **DATED** this 21st day of April, 2017.

22
23 

24
25 **RICHARD F. BOULWARE, II**
26 **UNITED STATES DISTRICT JUDGE**
27
28